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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HOWARD WAITE, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED (*)

The questions presented are:

1. May misstatements by an agency employee regarding the appeal procedure to be followed by a claimant after an administrative decision be "affirmative misconduct" such as to justify the application of the principle of estoppel to assert the defense of the Statute of Limitations against the Federal Government?

2. May the commencement of the running of the Statute of limitations be deferred on grounds other than estoppel

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*Petitioner submits that this case is a proper case for the issuance of a Writ of Certiorari. As stated in Point 4 of this Petition, the Court of Claims committed reversable error of a type not normally considered on Certiorari, specifically by dismising the Petition in the Court of Claims as matter of law and failing to allow Petitioner to amend his Petition to meet the issues relating to the Statute of Limitations as raised by the United States.

As of October 1, 1982, a new Court, the United States Court of Appeals for

because of mistatements by government officials regarding the appellate procedure to be followed?

3. Did the Civil Service Commission commit reversable error in refusing to consider evidence from the Navy Department and employing officers substantiating the de facto status of Petitioner as a government employee solely because the face of an employment agreement stated that the employee was employed by a private contractor?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding before the Court of Claims. There are no additional parties.

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the Federal Circuit, will be created, (28 U.S.C. Section 1292) which will have appellate jurisdiction over the United States Claims Court. In the event that this Petition for Certiorari is not granted, Petitioner requests that this Court take jurisdiction and remand the case to the United States Appeals Court for the Federal District for further proceedings.

The basis for this request is set forth in point 4 of this Petition.

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OPINIONS BELOW

The opinion of the United States Court of Claims (App. B, p. A-8) is not reported. The Opinion of the Board of Appeals of the Civil Service Commission (App. A, p. A-1) is not reported.

JURISDICTION

The order of the United States Court of Claims (App. B, infra) was entered on March 2, 1982. A Petition for Reconsideration was denied on April 2, 1982. The jurisdiction of the Court is invoked under Section 28 U.S.C. 1255.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 1295:

" (a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction--...(3) of an appeal from a final decision of the United States Claims Court."

Section 403(a), Federal Courts Improvement Act of 1982, Public Law 97-164, 94 Stat. 1994:

"Any case pending before the Court of Claims on the effective date of this Act in which a report on the merits has been filed by a commissoner, or in which there is pending a request for review, and upon which the court has not acted, shall be transferred to the United States Court of Appeals for the Federal Circuit."

No.A-1076

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OCTOBER TERM, 1982

HOWARD WAITE, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Petitioner, HOWARD WAITE, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court Of Claims entered in this proceeding on March 2, 1982.

STATEMENT

When Petitioner retired as an employee of the United States Government he claimed retirement benefits for employment covering the period from May 23, 1947, through April 18, 1968. The Civil Service Commission refused to allow Petitioner credit for claimed service periods from May 23, 1947 through May 1, 1950, and from July 15, 1963, through March 21, 1965. The total service claimed by Petitioner was 21 years and 10 months, while the Commission gave him credit for only 17 years and two months of service.

Because of the Court of Claim's disposition of the case on a Motion to Dismiss prior to the filing of an answer, the record in the Court of Claims is sparce. It is devoid of any facts regarding the actions taked by both the Petitioner and the Commission regarding the representations made by the Commission and the actions taken by the Petitioner in an attempt to comply with the directions continuously given by the Commission. The appendix contains

selected documents from the exchange of correspondence between the parties, which are relevant to the instant Petition. The acts of the Petitioner and the responses of the Commission regarding Petitioner's entitlement to Petitioner's claimed retirement rights are as follows:

Facts regarding "affirmative Misconduct":

When Petitioner's initial annuity was determined upon retirement, Petitioner disagreed with the amount, and inquired of the Civil Service Commmision.[1] He found that he had been given credit for less time than he had worked. Since he had knowledge of the fact that the Commission had taken the position that he was not entitled to the credit for work performed between May 23, 1947, and March 1, 1950, he sent certain aadditional documentation verifying that he was in

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[1] The name of the Civil Service Commission has been changed since the decision. For purposes of this Petition the original name will be retained.

fact a government employee (Letter, October 21, 1969, App. C, p.A-16). This evidence was rejected by the Commission. Letter, January 23, 1970, App.E., p.A-20). He then appealed this denial to the Commission, (Letter, February 20,1970, App. F, p.A-22) and presented certain additional documentary evidence that had been previously described as being required to allow Petitioner credit for such service.

The Commission, acting through the Board of Appeals, refused to reverse the adverse determination, based upon the stated failure of Petitioner to provide the necessary documentation to support his contention that he was appointed to the position he held by a federal officer, and that the contract he signed with a private contractor was signed at the request of, and "for the convenience of the government. " (Decision contained in Appendix A, p. A-1)

Upon receipt of the opinion, Petitioner again forwarded statements by his employing officers, and asked for a rehearing. (Letter, September 4, 1970 App. G, p.A-24) .

His request was denied, and a letter was sent to him that contained two statements regarding the further actions he might take to gain further considertion of his contentions that he was a government employee during the indicated time. This letter, dated January 15, 1971, (App. H, p. A-26) stated unequivocally that the decision of the civil service commission was final, "from which there is no further right of appeal." In addition, the letter contained a statement that informed Petitioner that the Commissioners might, in their discretion, "reopen and reconsider any previous decision" when new evidence was presented or if an erroneous legal determination had been made.

Over the next several years, Petitioner attempted to provide the evidence that the Commission, acting through its employees, continually stated was necessay to, and would give a basis for, a reconsideration of the Petitioner's claim. Petitioner's file contains over sixty documents reflecting a continuous exchange of correspondence

with the Commission.

Finally, on April 3, 1978, Petitioner received a letter (App. X, p.A-56) from the Commission informing him that there was not then, and never had been, any chance that the documentation continuously solicited by the Commission would be considered in his case. By this time the Statute of Limitations had run on the original decision of the Board of Appeals.

When Petitioner filed his petition in the Court of Claims, the government asserted the Statute of Limitations as a Bar in a Motion to Dismiss prior to the filing of an answer. The Motion was granted without leave to amend. (App. B, p.A-8).

Reliance By Petitioner:

a. The Period From May 23, 1947--March 1, 1950:

Petitioner based his claim to entitlement to credit for employment from May, 1947, through March, 1950, on the contention that he was in fact an employee of the Federal government and met the tests for creditable federal employment, even though he was requested

to, and did, sign an employment contract with a private employer for the covenience of the government. Petitioners factual contentions were, and are, supported by written statements of the officers who employed him, and the records of the Department of the Navy. The Navy Department, in a letter to the Civil Service Commission dated April 1, 1971, (App. I, p. A-29) verified the facts underlying Petitioner's employment, stating:

> "Records and information available to this command indicate that on or about 23 May 1947, Mr. Waite was appointed by a Naval Officer to perform work under U.S. Navy supervision. Contract of employment which Mr. Waite entered into with Contractor NOy 13931, and later with Contractor NOy 13626 on 29 September 1947, were effected for the convenience of the government to facilitate Mr. Waite being carried on the contractor's rolls for pay purposes only. Mr. Waite was continuoulsly employed under the supervision of U.S. Navy officials until 1 March, 1950, when he was converted to Civil Service status.

The Civil Service Commisson, in its rulings, recognizes that service performed while on a private contractor's payroll can be creditable service if the employee meets the requisites for being classified as a federal employee. These

tests were articulated in the decision rendered by the Board of Appeals and Review, (App.A, p. A-1), as follows:

> "Civil service retirement credit for contract service depends on whether it meets the three tests of Federal employment. In this connection, in addition to the requirements that a person be engaged in the performance of federal functions under authority of an Act of Congress or Executive Order and be under the supervision and direction of a federal officer, there must be an affirmative showing that an appointing officer of a government department hired the person and placed him on the payroll of a contractor, rather than on the rolls of the government department, for the convenience of the government. Full and complete documentation of these elements is required." (Ital. ours.) (Decision of the Commission, App A., p.A-1)

The Commission did not make a finding against the Petitioner on the merits of his contentions tnat he in fact signed the contract with the employer "for the convenience of the government" and not as a private employee. The findings and decision of the Commission were based on the alleged lack of documentary evidence presented by the Petitioner. In the decision the Commission stated:

> "The only documentation of the appellant's employment consists of the contracts of employment he entered into with the private contractors. The appellant's representations and the statements furnished on his behalf indicate that a federal official authorized the contrator to employ the appellant to fill a particular position. 'Authorization' does not satisfy the requirement that a person be appointed." (App A, p.A-6)

At this point the status of the matter was such that Petitioner justifiably believed that the reason for the denial of his claim for credit was that he did not provide sufficient documentation of the fact of his "appointment" by a federal officer. He then undertook to provide the necessary documentation.

Immediately upon receiving the decision of the Commission, he obtained additional documentation, and provided additional statements from the officers employing him to establish that he had in fact been "appointed" by a federal officer. He requested a reopening of the hearing and the consideration of additional documentation to supply the evidence deemed missing by the

Commission. (Letter, September 4, 1970, App.G, p.A-24). His reappeal was denied, and Petitioner was notified of the denial by a letter dated January 15, 1971 (App.H, p.A-26).

This letter of January 15, 1971, formed the basis for the subsequent actions taken by the Petitoner. In the letter Petitioner was advised that the decision of the Commission's Board of Appeals and Review were final, "from which there is no further right of appeal." Petitioner was not notified of the availablity of a judicial review of the decision of the Commission. However, in the letter Petitioner was advised that on certain conditions the Commission might reopen the decision. In the letter the Commission stated:

> "Decisions of the Commission's board of Appeals and Review are final administrative decisions of the Civil Service Commission, from which there is no further right of appeal. However, it has been provided by regulation that the Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that: (a) New and material evidence is

> available that was not readily available when the previous decision was issued; (b) The previous decision involves an erroneous interpretation of law or regulation or a misappication of established policy; or...." (App H, p.A-26)

After receiving the January 15, 1971, letter, Petitioner attempted to proceed in the only manner open to him as set forth in the letter. He provided additional documentation to provide the documentary evidence the absence of which was the stated basis for the Commission's denial of his service credit. For the following seven years he consistently furnished information and made inquiry as to what form the illusive "documentary evidence" must take. During this time he received constant assurances from Commission representatives that his case could be reconsidered if the proper documentation was furnished. An example is the letter dated March 16, 1972, (App. L, p. A-35) where the Commission acknowledges that service while on a contractor's payroll could be credited for federal service if the tests originally stated in the Commission's decision were met. The writer went on to

state:

> "In order to give further consideration to your request for credit for the service from May 23, 1947 through February 28, 1950, it will be necessary for you to submit three statements in affidavit form attesting to the fact that you were a Federal employee during the period in question. One of the affidavits about your employment must be from you personally. One of the other two affidavits must be from the Resident Officer in Charge, the Area Officer in Charge of construction, or some other Federal Officer having knowledge that you were Federally appointed. An affidavit is a statement of facts confirmed by the oath of the party making it, taken before an officer having authority to administer such oath."

Several exchanges of correspondence took place between the Commission and Petitioner regarding the form and content of the affidavits. For example, one affidavit was returned for notarization (Letter, April 5, 1972, App.N, p.A-).The corrected affidavit was returned by Petitioner. The letter dated July 10, 1973, (App.Q, p.A-42) acknowledges receipt of the affidavits as described by the Commission, but states that affidavits continue to be inadequate to

change the decision of the Commission. The writer states:

> "The affidavits you submitted from Captains Hansen and Gordanier do not specifically show that you were appointed or employed by a Federal officer in his official capacity as such and that you were under the supervision and direction of a Federal officer. The affidavits were substantially the same as those previously submitted and do not furnish any new evidence to show you met the three criteria of Federal employment."

> "Any additional new evidence you wish to submit will be carefuly considered in connection with your claim; however, there is no authority to consider your "contractor" service as Federal employment on the basis of the information now available."

Petitioner was continuously led to believe that if he presented additional evidence to meet the deficiencies in evidence stated by the Commission, the commission would reopen his case and he would obtain a favorable ruling. After presenting numerous modifications to the affidavits, petitioner inquired as to what form was appropriate. In a letter dated December 22, 1976, (App. W, p. A-54) in response to one of Petitoner's numerous

requests, the Commission stated":

> "There is no prescribed wording for the affidavits regarding such service. However, at lease one of the affidavits must be signed by the Resident Officer in Charge; Area Office in Charge of Construction; or other Federal Officer having knowledge that the individual was Federally appointed. A contractor's statement that during the period of employment the claimant was an employee of the Navy or Army and not an employee of the contractor is also admissible evidence.

Petitioner submitted such an affidavit from the contractor, and received a reply that it was "not germaine in establishing Mr. Waite as a government employee during the time in question." (See App.X, p.A-56). The apparent confusion and inconsistency that met every attempt by Petitioner to provide the documentary evidence in the form stated by the commission became clear by the letter of the Commission dated April 3, 1978. (App. X, p.A-56) For the first time Petitioner was informed that all of his previous attempts were futile, and that the "secondary evidence" establishing the actual facts of the

employment was foreclosed by the existence of the written contracts with the private employer. The letter stated:

> "The need for secondary evidence has never existed or been in question in your case. Instead primary evidence (copies of Contracts NOy 13931 and NOy 13636) has been a part of your case file since 1958 and formed the basis of the Commission's original denial letter dated February 26, 1958. This denial of credit has been consistently reaffirmed."

For the first time, in 1978, after the six year statute of limitations had expired, (28 U.S.C. Section 2501) Petitioner was informed that the Commission would not look behind the existence of the contracts that he executed for the convenience of the government. The basis of the Commission's decision was solely on the fact that the fact of the contract designated Petitioner as the employee of the private contractor, and all determinations regarding the actuality of the employment by the government were foreclosed because the face of the contract was determinative.

Petitioner again attempted to gain clarification of the position of the Commission. In response, the commission reiterated (Letter dated October 30, 1978, App.Y, p.A-60) that the documentary evidence Petitioner was led to believe would change the decision of the commission was not considered relevant. The writer stated:

> "The use of the words'the only documentation' in the Appeals Review Board's July 22, 1970, decision referred to the copies of your employment contracts executed many year age [sic](1947). These documents constitute primary evidence of your employment. The affidavits and letters which you have sent to us since your retirement in 1969 are "secondary" evidence and cannot overcome the "primary" evidence (the 1947 contracts contained in your file."

b. <u>The Period From July 15, 1963, through March 21, 1965.</u>

When the original computation of retirement service time was made by the Commission, no itemization was given of the periods of employment which were omitted in computing the Petitioner's

creditable service. Upon receiving the initial determination Petitioner immediately requested that he be furnished with the computations forming the basis of the annuity. (Ltr, January 5, 1970, App. D, p. A-19). In spite of repeted requests, the accounting was not provided until June 11, 1974, when it was finally furnished. (Letter, June 11, 1974, App. T, p. A-48). In the June 11, letter Petitioner was, for the first time, officially notified that he was not being given credit for the period from July 16, 1963, through March 22, 1965.

Petitioner had been employed by Captain Norman M. Martinsen to work in a Civil Service position commencing July 16, 1963. Because of administrative mistakes in the processing of the paperwork, Petitioner was not placed in the proper position on paper, although he was in fact hired for a position which would guarantee him continuous service for retirement purposes.

In support of his claim for credit for this period, to counter the mistakes contained in his personnel record,

Petitioner supplied a letter from the hiring officer, Captain Martinsen, which attested to the actual events underlying the employment of the Petitioner, and the fact that administrative error was the cause of the failure to properly classify the Petitioner. (Letter, March 6,1972, App.K, p. A-31).

This letter was not considered by the Commission.

The balance of the letters contained in the Appendix, and not specifically referred to in this Statement, show attempts made by Petitioner to meet the requests of the Commission. It is apparent that the final decision regarding the reopening of the case was not made by the body making the decision, the Board of Appeals and Review, but was made by an examiner at a low level of the process. (Letter, March 5, 1975, App. U, p. A-50). Thus, Petitioner never received the opportunity to have his additional evidence considered.

After receiving the April 3, 1978, letter (App.X , p.A-56), petitioner again communicated with the Commission to attempt to rectify the situation. Finally he filed a Petition in the Court

of Claims for a determination of his entitlement to retirement benefits. The Government filed a Motion to Dismiss, raising the State of Limitation (28 U.S.C. Section 2501) as a defense. The Court of Claims granted an Order of Dismissal without leave to amend, and the order constitutes a final adjudication on the merits in accorance with the provisions of Rule No. 102(b) of the Rules of the Court of Claims.

REASONS FOR GRANTING THE WRIT

This Petition for Writ of Certiorari presents the issue of when and under what conditions the United States Government may be forclosed from asserting the Statute of Limitations as a defense to a lawsuit arising out of a claim for an entitlement to benefits authorized by Acts of Congress. Since the various entitlement programs constitute approximately 60% of the annual budget, it is essential that a claimant be able to reasonably rely upon the statements and other conduct, both affirmative and negative, of agency officials regarding the processing of a claim if the claimant has furnished proper information to the agency, and has otherwise complied with the requirements for entitlement. To the extent that the claimant is misled or otherwise not properly informed as to the proper procedures to be taken, and reasonably relies upon the actions of the agency personnel, he or she should be entitled to be protected against a bar of the Statute of Limitations.

In actions other than those in which the Government is a party, the lower

courts have established two theories of equitable relief which would bar the defense of the Statute of Limitations These principles are set forth in Naton v. Bank of California, 649 F.2d 691 (9th. Cir. 1981) as follows:

> ". . . harsh results [of the application of the Statute of Limitations] may be avoided through equitable modification of the limitation period."
> "Two kinds of equitable modification have been recognized: (1) equitable tolling, which often focuses on the plaintiff's excusable ignorance of the limitation period and on lack of prejudice to the defendant (citations); and (2) equitable estoppel, which usually focuses on the actions of the defendant (citations)"(Brackets ours.) (At 696.)

Point 1 of this Petition specifies the grounds for justifying the issuance of a Writ of Certiorari on the issue of estoppel of the Government to assert the defense of the Statute of Limitations. Point 2 concerns theories, other than estoppel, which would defer or toll the operation of the Statute of Limitations.

In determining the Petitioner's right to have his employment in Guam between May 23, 1947, and March 1, 1950,

be determined creditable employment for retirement purposes, the Board of Appeals of the Civil Service Commission erroneously failed to consider relevant evidence presented by petitioner which, if considered, would have resulted in a decision favorable to the petitioner. Point 3 specifies the grounds to justify the issuance of a Writ of Certiorari relating to this issue.

The order of the Court of Claims sustaining the defendant's Motion to Dismiss without leave to amend was contrary to the basic pleading rules established by both the District Courts and the Court of Claims. Point 4 specifies the grounds to justify the issuance of a Writ of Certiori, on this issue.

1. MAY MISSTATEMENTS BY AN AGENCY EMPLOYEE REGARDING THE APPEAL PROCEDURE TO BE FOLLOWED BY A CLAIMANT AFTER AN ADMINISTRATIVE DECISION BE "AFFIRMATIVE MISCONDUCT" SUCH AS TO JUSTIFY THE APPLICATON OF THE PRINCIPLE OF ESTOPPEL TO ASSERT THE DEFENSE OF THE STATUTE OF

LIMITATIONS AGAINST THE FEDERAL GOVERNMENT?

The basic issue in this Petition relates to the question of the proper procedure to be applied in determining whether or not estoppel may be applied against the government in a given situation.

Once the traditional rule prohibiting the application of estoppel against the Federal Government had been relaxed, the lower courts began the process of fashioning the rules relating to the determination of when and under what conditions estoppel would lie against the government. The history of the development of the estoppel principle is set forth in Thompson, Equitable Estoppel of the Government, 79 Columbia Law Review, Part 1, p. 550 (1979).

The courts that developed the estoppel principles took two different approaches in determining the critical elements which would give rise to the application of estoppel against the government. The original approach consisted of attempting to develop

specific categories of cases which would provide definite guidelines as to the types of situations in which estoppel would be permitted. One of the early attempts at formulating a specific category was based upon the nature of the activity performed by the government. If the government was acting in a proprietary capacity, it could be estopped, while if it was acting in its sovereign capacity, it was not subject to estoppel. It soon became apparent that this approach would not work. See United States v. Georgia-Pacific Company, 421 F.2d 92 (9th Cir. 1970). A number of other distinctions were formulated by the Circuit Courts, but which resulted in conflicting decisions between the various Circuit Courts.[2]

As an alternative to the attempt to

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[2]The areas of conflict between the decisions of the Circuit Courts is extensive. Most Districts allow estoppel against the government even though it is acting in its sovereign capacity, but the Court of Claims (Roberts v. United States,, 357 F. 2d 938 (Ct. Cl. 1966), and the United States Court of Customs and Patent Appeals (Air-Sea Brokers, Inc., v. United States, 596 F.2d 1008 (1978) refuse to apply estoppel against

formulate specific criteria, The Ninth Circuit developed a method of determining the question of estoppel that does not involve the creation of rigid categories, but involves the balancing of the unjust result of the government act (or other conduct giving rise to the claim that estoppel should be envoked) against the effect on the public interest.

The procedure set forth by the Ninth Circuit was articulated in the case of United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir 1973). After a review of some of the attempts to develop specific categories relating to the imposition of estoppel, the Court decided to base its

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the government when it is acting in its sovereign capacity.

Estoppel is not restricted to authorized acts of government agents in some circuits (Brandt v. Hickle, 427 F.2d 57 (9th Cir. 1970) and Portmann v. United States, 674 F.2d 1155 (7th Cir. 1982), while other courts refuse to apply estoppel for unauthorized conduct. (Goldberg v. Weinberger, 546 F.2d 477 (2nd Cir. 1976, and Bornstein v. United States, 345 F.2d 558 (Ct. Cl. 1965).

Other instances of conflict bewtween the Circuit Court decisions are listed in the Portmann, case, supra.

The Second Circuit is in agreement with the balancing procedure of the Ninth Circuit. See Portmann, supra.

decision on "elementary fairness." (at 989). The rationale was stated as follows:

> 'The Moser-Brandt-Schuster line of cases establish the proposition that estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel." (Citation) "This proposition is true even if the government is acting in a capacity that has traditionally been described as sovereign (as distinguished from propretary) although we may be more reluctant to estop the government when it is acting in this capacity." (at 989).

The result of the Lazy FC Ranch decision is to create a balancing between the injustice suffered by a person who relies upon misleading acts or conduct of a government official, and the impact on the public interest if estoppel is envoked.

As a result of the adoption of this balancing procedure, the Ninth Circuit has been placed in a position of conflict with the circuits that follow the specific category method of applying estoppel.

The recent case of Schweiker v. Hansen, 450 U.S. 785 (1981) , illustrates the difficulty in establishing fixed criteria for the application of estoppel. The Circuit court, in the case of Hanson v. Harris, 619 F.2d 942 (2nd Cir. 1980), reversed, 450 U.S. 785,had established a fixed category distinction, based upon a subtantive/procedural classification. This court reversed, specifically disapproving of such a classification (Schweikert v. Hansen, supra.)

This Court reaffirmed its determination that in order for the government to be estopped, there must be some "affirmative misconduct" on the part of the government official. Factually it was determined that such misconduct did not exist.

However, as was pointed out in the dissenting opinion, the Circuit Courts are in substantial conflict over what type of conduct will constitute such misconduct. (Schweikert v. Hansen, Supra, p. 791).

The opinion indicates that a

certain type of conduct by the government (i.e. informal statements regarding elgibility for Social Security benefits and failure to follow the appropriate manuals regarding the information to be given to applicants) do not constitute sufficient "affirmative misconduct" upon which estoppel may be based.

From the opinion it can be seen that mistaken over-the-counter advice to a potential claimant for benefits will not automatically constitute affirmative misconduct if the applicant may correct the action.

However, further statements by the Court give an indication that in the future a balancing test might be adopted by the court. The Court continued:

> "But at worst, Connelly's conduct did not cause respondent to take action, cf. Federal Crop Insurance Corp. v. Merrill, supra,, or fail to take action, cf. Montana v. Kennedy, supra, that respondent could not correct at any time." (at 789)

The above language raises the question of whether the same conduct by Mr. Connelly would be "affirmative

misconduct" if the conduct caused the claimant to take actions which could not be corrected and as a result suffered great detriment.

This dilemna could be resolved by the adoption of the Ninth Circuit balancing test where a determination of the issue of "affirmative misconduct" could be made within the basic structure of the overall determination of the issue of estoppel. The misconduct of the government would not be set forth as a separate item, but would be determined as a part of the whole transaction.

The emphasis would shift from defining specific acts that could be the subject of estoppel (ie., defined as "affirmative misconduct",) to analyizing the effect of the conduct and the impact of the application of estoppel on the applicant and the public interest.

The result in the Schweikert, case, supra, would be justified upon the basis that the harm to the claimant (loss of one year of past benefits, remediable as to the future benefits), is small in consideration to the effect on the public of making social security employees the

insurers of the accuracy of all information given to claimants, over the counter or otherwise.

By incorporating the determination of the type of misconduct as a part of the overall determination of the question of estoppel, it would not be necessary to develop a body of law specifying exact and specific categories of actionable misconduct.

The instant case presents a factual situation within the qualities set by Schweikert v. Hansen, supra. Because of the misinformation given to Petitioner (that there was no further appeal from the decision of the commission, but that the commission could reopen the decision upon the submission of new evidence) Petitoner did not file a suit for judicial review of the commission's action until after the statute of limitations had run. The result of the subsequent application of the statute of limitations is that Petitioner is foreclosed from bringing a judicial action to reverse the erroneous legal ruling regarding evidence made by the

Board of Appeals and, as a result, he is permanently and irrevocably deprived of approximately 20% of his retirement annuity for the balance of his life.

It is important to note that the above principles have developed regarding the types of cases in which estoppel will apply against the government. Each individual litigant will have to meet the individual elements of estoppel once it has been determined that the remedy is available in the situation. United States v. Georgia Pacific, 421 F.2d 92 (9th Cir. 1970).

Because of the existence of conflicts between the circuits on virtually every one of the specific principles, and the conflict between the circuits on the approaches to be taken in determining is estoppel is to be available in a given situation, it is submitted that a Writ of Certiorari should be granted to resolve the existing uncertainty.

2. MAY THE COMMENCEMENT OF THE RUNNING OF THE STATUTE OF LIMITATIONS BE DEFERRED ON GROUNDS OTHER THAN ESTOPPEL BECAUSE OF MISTATEMENTS BY GOVERNMENT OFFICIALS REGARDING THE APPELLATE PROCEUDRE TO BE FOLLOWED?

The ruling of the Court of Claims in granting the Government's Motion to Dismiss without leave to amend, constituted a holding that there are no factual situations in which the Government is either subject to equitable principles (such as equitable tolling), or that the statute of limitations may have been deferred for legally cognizable reasons. Such a ruling places the Court of Claims in a position that is in substantial conflict with the other circuits.

Petitioner contends that due to the importance of the establishment of a coordinated scheme for determining when the statute of limitations will not apply because of misrepresentations and other misleading acts of the government agents, a Writ of Certiorari should issue.

The following constitute different theories under which the statute of limitations will not bar a claimant who has been in some manner misled by the Government.

Equitable Tolling:

In the case of Naton v. Bank of California, 649 F.2d 691 (9th Cir. 1981) the Ninth Circuit applied the principle of equitable tolling between private litigants. In the Naton case, supra, the court said:

> "Equitable modification of the limitations period may be appropriate when misleaing conduct of the defendant has induced the plaintiff to delay filing notice of intent to sue". (at 696)

Thus, in Naton,,supra, the misleading conduct induced the plaintiff to fail to take a procedural step necessary to assert his or her contentions in the judicial process.

The Third Circuit has also recognized the principle of equitable tollingy in School District and City of Allentown v. Marshall 657 F.2d 16 (3rd Cir. 1981). The court, while not applying the doctrine under the facts of the case, held equitable tolling to be

applicable to a statute of limitations. The court, in considering the status of prior cases, reviewed the principles allowing tolling, stating:

> "[(1)]. The defendant has actually misled the plaintiff respecting the cause of action, [(2)] the plaintiff has in some extraordinary way been prevented from asserting his rights, or [(3)] the plaintiff has raised the precise statutory claim in issue, but has mistakenly done so in the wrong forum.".
> "We do not now decide whether these three categories are exclusive, but we agree that they are the principal situations where tolling is appropriate". (at 19, 20).

The principle of equitable tolling of the statute of limitations should be applicable where a claimant diligently seeks to follow the procedures outlined by the agency.

Denial of Due Process:

A second theory regarding misrepresentation of procedural steps is stated as an alternate theory in Brandt v. Hickel, 427 F2d 53 (9th Cir 1970). In the Brandt case, supra, the government official failed to notify the claimant of

a step in the process which affected the claimant's rights. While the specific issue involved the proper steps to be taken within the agency structure, the court stated a broader due process principle,

> "The due process clause requires that notice must be reasonably caluculated to inform parties of procedures which may directly and adversely affect their legally protected interests". (at 56)

The notification given to petitioner (App. H, p. A-26), in affirmatively stating that there was "no further right of appeal" misled petitioner. The statement was not limited to administrative appeal, but made a direct statement regarding <u>all</u> appeals. This was a seriously misleading statement.

The assertion of the Statute of Limitations in the circumstances is subject to challenge as a violation of due process of law.

<u>Deferral of Finality of Decision</u>:

Although the statute of limitations does not commence until an administrative procedure is final,the court of claims applys a special principle deferring, in certain circumstances, the application of

the statute of limitations by deferring the finality date of an administrative procedure. In Friedman v. United States, 310 F.2d 281 (Ct. Cl. 1962) the court surveys the principles it envokes regarding the statute of limitations. There the court stated:

> "(c). A Board's action (or failure to act) is not final if (i) the claimant has been misled, (ii) the board's decision is tentative and invites reopening , (iii) the armed service itself reopens the case, or (iv) there are other circumsances depriving the action or non-action of finality.

The correspondence between the Commission and the Petitioner wherein the Commission kept specifying the nature of the evidence necessary to obtain the only relief they informed Petitioner was possible, evidences the type of action on the part of the government that should defer the commencement of the statute until the agency gives a definite notice that all procedures are completed.

The conduct of the Commission falls within the quoted provisions of the Friedman case, supra.

3. DID THE CIVIL SERVICE COMMISSION COMMIT REVERSABLE ERROR IN REFUSING TO CONSIDER EVIDENCE FROM THE NAVY DEPARTMENT, FROM THE VARIOUS EMPLOYING OFFICERS AND THE PRIVATE CONTRACTOR SUBSTANTIATING THE DE FACTO STATUS OF PETITIONER AS A GOVERNMENT EMPLOYEE SOLELY BECAUSE THE FACE OF THE EMPLOYMENT AGREEMENT STATED THAT THE EMPLOYEE WAS EMPLOYED BY A PRIVATE CONTRACTOR?

The original decision mady the by the Board of Appeal of the Civil Service Commisssion (Appendix A, p.A-1) was based upon an erroneous legal decision regarding the evidence presented by the Petitioner to establish that he met the criteria for creditable government employment. The Commission determined that the only relevant evidence before it was the original contract of employment with a private contractor, and from that contract alone it determined that Petitioner was not a government employee for retirement purposes. The Board erroneously ruled that the evidence

presented by the Petitioner was not relevant.

In the original decision the commission did not specifically state that the reason that it would not consider the evidence was that it was bound by the face of the document, but based its decision on the claimed lack of supporting data presented by the claimant. This basis for the decision was not communicated to the Petitioner until October 30, 1978 (App. Y, p. A-60).

This failure to consider the supporting evidence is clearly an erroneous legal determination. Is is clearly established that contemporaneous transactions may properly be taken into consideration to ascertain the correct construction of a contract and relationship of the parties. United States v. Bethleham Steel Co., , 205 U.S. 105,(1906). Evidence to supplement the face of a contract is admissible to prove an actual agreement between the parties. Sylvania Electric Products, Ind., v. United States, 458 F2d 994 (Ct. Cl. 1972).

A virtually identical factual situation was presented in Jankovic v.

United States, 384 F.Supp 1355 (1974), where the Civil Service Commission refused to look beyond the face of a contract of employment (which stated the employee was an independent contractor), and refused to consider statements of the State Department that the employee was in fact an employee of the United States. The Court stated;

> "Obviously the BAR chose not to be guided by the findings and opinions of the employing agency, but chose to rely on form, ie., the literal language of the contract, rather that substance, ie. the performance of the contract." (at 1360)
>
> * * *
>
> "In the light of the foregoing, it is the Court's view that the CSC erred in its failure to give sufficient weight to the submission of the State Department particularly when read in the light of the Comptroller General report of June 30, 1960. The Court is led to the conclusion that when the whole record is considered there is not substanital evidence to support the narrow restricted holding of the BAR." (at 1361)

The District Court granted the employee's motion for a summary judgment and found that he was a government employee.

In spite of the 1974 ruling of the Court in Jankovic, supra, the Commission

continued to take the position that the face of the document controlls the substantive reality of the employment relationship of the government employee. The April 3, 1978, letter shows that the Commission continues to assert that the face of the document controls.

Petitoner contends that a Writ of Certiorary should issue in order to provide direction to the Civil Service Commission as to the nature of evidence that must be considered in making the determination of the employment status of a government employee.

4. THE COURT SHOULD GRANT CERTORARI IN THIS CASE AND REMAND IT TO THE UNITED STATES COURT OF APPEALS UPON ITS CREATION ON OCTOBER 1, 1982.

In entering the Order of Dismissal, especially without granting leave to amend, the Court of Claims committed substantial error of a type that is routinely recognized by an appellate court as reversable error.

The dismissal is, pursuant to the provisions of Court of Claims Rule 102(b), a final adjudication on the merits. As applied to the instant case, it is apparent that the legal principles applied by the Circuit Courts, and clearly set forth by this Court, establish that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief. Conley v. Gibson, 355 U.S. 41(1957).

Where a complaint in the District Courts is dismissed on the ground that it

fails to state a claim, the Courts have established the principle that leave should be granted to amend, if appropriate, and that the court should state the reason for the dismissal so that the complaint can be amended. Bonnano v. Thomas, 309 F.2d 320, 322(1962)

The factual positions set forth by the Petitioner in the Statement establish that if the facts stated therein are true, there is a ground for the application of estoppel, or one of the alternative remedies deferring the commencement of the limitations period, against the government. The failure of the Court of Claims to allow Petitioner the opportunity to litigte his contentions regarding a defense against the Statute of Limitations constitutes reversable error.

In addition, there is an additional reversable error committed by the Court of Claims. Petitioner raised the issue of the applicability of the "continuing claim" doctrine, which, under the principles adopted by the Court of Claims would only apply the Statute of Limitations against the Petitioner for

installments of his annuity accruing within the six year statutory period preceeding the filing of his Petition. The Court of Claims again dismissed the Petition without affording the petitioner the opportunity to establish factually the basis upon which the continuing claim exception would rest. Petitioner contends that the cases of Roberts v. United States, 151 Ct. Cl. 350 (1966),, and Friedman v. United States, 310 F.2d 477 (Ct. Cl. 1962), provide for the application of the continuing claim theory, and that the Court of Claims has erroneously applied the legal principles contained in the said cases so as to hold them inapplicable to the Petitioner's case.

As was previously pointed out in this Petition, there are substantial factual questions connected with the application of the legal principles presented by Petitioner in his original Petition in the Court of Claims, and the dismissal of his petition without leave to amend constitutes reversable error.

The above issues were presented to the Court of Claims in a Motion for Reconsideration after the original order

was rendered.

In the event that this Court determines that review by this Court on the merits is not appropriate, Petitioner requests that the Petition for Certiorari be granted, and the matter be remanded for further proceedings to the United States Court of Appeal for the Federal Circuit upon its creation on October 1, 1982, (pursuant to the provisions of 28 U.S.C. Section 1295(3), or transferred to the said court pursuant to the provisions of section 403(a) of the Federal Courts Improvement Act of 1982 (Public Law 97-164.

CONCLUSION

For the above reason, A Writ of Certiorari should issue to review the Order Granting the Motion To Dismiss entered by the Court of Claims.

Respectfully submitted,
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